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NO. 31

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

F. H. REILY,
Respondent.

BRIEF FOR F. H. REILY, RESPONDENT

The respondent accepts, generally the statements set forth in the brief by petitioner, of all the facts which were involved in this cause, both in the District Court and the Circuit Court of Appeals, in which the construction of the Act of June 21, 1926, is involved.

This act was construed by the United States Circuit Court of Appeals in the case of *Johnson* v. *United States*, 283 Fed. 954, in an opinion written by Judge Robert E. Lewis, who was at that time a member of the United States Circuit Court of Appeals of the 8th Circuit. The United States contended this opinion upheld their contention in this case in the United States Circuit Court of Appeals in the following language:

> "That case in its effect sustains our contention as to the proper interpretation of this statute." (Quotation page 7 of brief filed in Circuit Court.)

However, Judge Robert E. Lewis wrote the opinion in

the instant case in the United States Circuit Court, for the 10th Circuit, which is reported in Federal Reporter, Volume 62 (2d), 621. Judge Lewis, we may conclude, had formerly the record before him in the case of *United States* v. *Estill,* reported in 62 Fed. (2d) 620. That he studied the record and the construction to be placed upon the Act in question and held that the Indian, Wa-pe-com-e, was authorized under said Act, to execute the deed in question and to convey the land.

The Act of June 21, 1906, insofar as it relates to Kickapoo Indians, reads as follows:

> "All restrictions as to sale and encumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, who have been allotted land in Oklahoma, or Indian Territory, are hereby removed. Provided, however, that all such Indian allottees who is a non-resident of the United States may lease his allotment without restriction for a period not exceeding five years; * * *"

The proviso therefore provides that any such Indian as named above, who is a non-resident, may lease his allotment without restriction. The clause of the statute reading as follows:

> "And of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been, or are now known as Indians of said tribe, affiliating with said Kickapoo Indians, now or hereafter non-resident in the United States* * *"

clearly refers to the latter Indians named, and not to Kickapoo Indians. In other words for the Shawnee, Delaware, etc., to have the right to sell or encumber lands inherited or otherwise, they must become as Indians of said tribe,

that is to say, Delaware, Caddo, etc., and they must affiliate with Kickapoo Indians who are now, or hereafter non-resident in the United States.

It is clear that the above is the meaning of the Act, and it would require a strained construction to give it any other meaning.

It is contended by the petitioner that all doubtful statutes are construed favorable to the Indians. In the first place, this is not a doubtful statute. This Court said in the case of *First National Bank of Detroit* v. *United States et al.*, 234 U. S. 246, 56 L. ed. 1298, in construing a statute removing restrictions of the sale of allotments of Indians:

> "Evidently this legislation contemplated in some measure the rights of others who might deal with the Indians and obviously was intended to enlarge the right to acquire as well as to part with land held in trust for the Indians."

So we say that the intent and purport of this Act was to permit Kickapoo Indians to sell or encumber lands acquired by inheritance and otherwise, as distinguished from their allotments, and who have received such allotments of land in Oklahoma, or Indian Territory. The portion of the Act referring to the other tribes of Indians, required a condition, to-wit, that they must affiliate with Kickapoo Indians who are now, or hereafter non-resident in the United States. This clearly does not apply to a Kickapoo Indian for there would be no reason in providing that a Kickapoo Indian would be required to affiliate with members of his own tribe even of his own family.

So all of that portion of the Act, after the words "Kickapoo Indians" and preceding the word "who," clearly does not refer to the Kickapoo Indians, but to the Indians of the other tribes mentioned therein.

Further on in the case just cited above, this Court said:

> "If Congress intended to remove restrictions only from those who had half white blood, or more, it would have inserted in the Act the words necessary to make that intention clear; that is, we deem this a case for the application of the often expressed consideration, aiding in interpretation, that if a given construction was intended it would have been easy for the legislative body to express it in apt terms."

So we say in this instant, if Congress intended to make it a condition precedent for the Kickapoo Indians to be a non-resident at the time he acquired the land by inheritance, or otherwise, it could have easily expressed it in apt terms.

The respondent cannot agree with the language in the Government's brief at page 14, where it says:

> "Unfortunately the language used by Congress to accomplish this purpose was not well chosen, making the intention obscure."

The respondent does not think the language chosen is obscure, or the intention of the Congree is not clear. Neither did the Circuit Court of Appeals seem to think so when they wrote the Johnson opinion and the Estill and Reily opinions. The Government did not bring the record up in the Estill case because the court said the heirs were adults and residing in the Republic of Mexico on the 21st day of June,

1906, and thereafter. They complain of the opinion of the Circuit Court in this case because Judge Lewis said:

> "Applying the Act of June 21, 1906, quoting the Estill case, to the facts of this case, which are not substantially different and the facts in *United States* v. *Estill, supra,* the decree appealed from should be affirmed."

The reason Judge Lewis said the facts were "not substantially different" was because the respondent had brought himself within the terms of the statute as interpreted in the Johnson and Estill cases, to-wit, that it was unnecessary for a Kickapoo Indian to be a non-resident at the time of the inheritance of the land.

Clearly Judge Lewis understood this and as the record showed that the allottee was living in Mexico at the time of the adoption of the Act, along with the heir, and as Wa-pe-com-e, the heir, was allotted land in Oklahoma, he therefore was a qualified Indian and had a right to sell and dispose of the land in question.

The Indians whose rights to sell were construed in the case of *Johnson* v. *United States, supra,* were not Kickapoos, but were absentee Shawnee Indians. In this case, Judge Lewis finds that the deceased ancestor was an absentee Shawnee allottee. That the grantor was his heir and conveyed his inherited interest in the ancestor's allotment. That such grantor was an absentee Shawnee Indian and had been allotted land in his own right and that they and their ancestors were affiliated with non-resident Kickapoo Indians.

This opinion shows that the provisions of the Act rela-

tive to the affiliation of Indians with non-resident Kickapoo Indians, means members of those other tribes named in the Act.

Effect of Construction of Act.

The Johnson case was handed down on September 11, 1922, and has been considered the law relative to the right of Kickapoo Indians to sell and dispose of their inherited lands from that time up until the date of the filing of the petition in this case in the lower court.

A large number of pieces of inherited land have been sold by the heirs, the lands have been improved and rendered for taxation, and held as homes by the purchasers from that time until now. The law stated in the Johnson case has become a rule of property in this jurisdiction and if this Honorable Court should hold otherwise the title to a large number of pieces of land would be unsettled, untold injuries would result and a great loss involved to those who, in good faith, paid valuable consideration for such lands, improved them, and have been residing upon them as their homes, without objection upon the part of the Government, and in many instances sold and resold by warranty deed. All without objection or interference upon the part of the Government and with their active acquiescence.

Effect of Judicial Construction.

Many terms of Congress have passed by since September 11, 1922, and since the rendition of the opinion in the case of Johnson vs. United States, and the Congress has

not seen fit to enact any legislation bearing upon the Act of June 21, 1906, until the Act of February 17, 1933.

The Indian Department, so far as respondent knows, has not even importuned the Congress to pass any such amendatory acts until February 17, 1933, but have allowed the same to stand with the construction placed upon the Act of June 21, 1906, by the United States Circuit Court of Appeals.

We say the rule therefore is:

> "Where a judicial construction has been placed upon the language of the statute for a long period of time, so that there has been abundant opportunity for the law making powers to give further expression to its will, the failure to do so, it has been declared, amounts to legislative approval and ratification of the construction placed upon the statute by the court" 25 R. C. L. 956 Ear. 212.

This same rule was stated in the case of *Douglass* v. *County of Pike,* 101 U. S. 687, in the following language:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contracted rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

So respondent says that by reason of the plain and unequivocal language of the statute under consideration and the judicial construction placed thereon over twenty years ago, that this construction becomes a part of the

statute and gave the heir a right to sell and encumber. It is notable no allegation of fraud is made by the Government in this entire transaction and the assumption would be that the Indian was treated with fairness and paid a just and reasonable price for his land, and there is nothing involved but the construction of the Act.

The petitioner's construction requires the court to hold that the modifying term, or definite language, "now or hereafter non-resident in the United States," modifies, or defines, the adult Kickapoo Indians first mentioned in the act, as well as the other named tribes, and this upon its face is an absurdity for putting the language in the form that the petitioner's construction requires, it would read as follows:

> "All restrictions as to sale and encumbrance of all lands inherited and otherwise, of all adult Kickapoo Indians, affiliating with said Kickapoo Indians now or hereafter non-resident in the United States, who have been allotted land in Oklahoma or Indian Territory, are hereby removed; * * *"

Plainly, there is no justification for holding that there was any intention, or reason for saying, that "now or hereafter a non-resident in the United States" applies to the adult Kickapoo Indians. This is clear from the fact that as to the Kickapoo Indians, its benefits are confined to the adult members of the tribe, while as to the Shawnees, Delawares, Caddos and Wichitas, no distinction is made between adults and minors, and this is made clear by the second proviso in making provision for leasing of the minor allottee's land the adult Kickapoo can't lease.

The Act, of course, is controlled by the conditions prevailing at the time it passed. It is manifest in reading this statute, and the others relating to the Kickapoo Indians, that all of the Kickapoo Indians were supposed to be in Mexico, or were planning to go there, and hence, there was no restriction except that they must be adults, and either inherited or purchased land, to come within its purview, but Congress saw fit to confine and narrow the provisions of the act as to the other tribes, and make it applicable only to those who went to Mexico, or affiliated with those who did go. In other words, it amounted to confining the act to the adult members of the Kickapoo tribe and the adopted members of the tribe coming from the Delawares, Caddos, Wichitas or Shawnees.

Answer to Government's Second Specification of Error.

The respondent says that the Government is wrong in its interpretation of the statute in question. Conceding that the italicized part of the statute, as set out on page 7, should be read together, omitting that part of the statute which is not italicized, it appears as follows:

> "All restrictions as to sale and encumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians now or hereafter non-resident in the United States who have been allotted lands in Oklahoma or Indian Territory, are hereby removed."

The Act means that all restrictions as to sale and encumbrance of such inherited lands, of either Kickapoos, Delawares, Caddos or other Indians named in the Act, who affiliate with Kickapoo Indians now—meaning at the time

of the adpotion of the Act—or hereafter—meaning in the future—non-resident in the United States, and who have allotted lands in Oklahoma, are removed. In other words, if the grantor, Wa-pe-com-e inherited this land, and there is no question about that, and he affiliated with Kickapoo Indians who are non-resident in the United States after June 21, 1906, and if he was allotted land in Oklahoma, he is a qualified Indian to sell.

The Act does not say where such Indian has to affiliate with such Kickapoo Indians. There is nothing in the Act to indicate that such heir has to affiliate with Kickapoo Indians who are temporarily in Oklahoma or have to affiliate with Indians in the Republic of Mexico, or any other location, but if he affiliates with Kickapoo Indians who are now, or hereafter non-resident, with the other conditions present, he is a qualified Indian.

This, we say, is the necessary construction of the Act, if the Act is taken as contended for by the Government, providing they are not permitted to separate a clause in the Act as they have attempted to do on page 7 of their brief. In other words, they desire to separate the sentence "affiliating with said Kickatoo Indians now or hereafter non-resident in the United States" by dividing it at the word "Indians" and thereby attempting to give the Act a strange interpretation not authorized by the terms of the Act.

Respondent says that when an Act is clear, plain and unequivocal in its language a court is not authorized to change its plain terms by any rules of construction or to

give it a different meaning than that conveyed by its plain language. Hence, respondent says that the Act means that all restrictions, as to sale and encumbrance of all lands inherited and otherwise of all adult Kickapoo Indians who have been allotted lands in Oklahoma, are removed. It does not depend upon any act of the Indian—the law removes the restriction. When the law removes it the Indian has a right to act the same as any other citizen of the United States and to sell and dispose of such land.

This Court, in stating the rule for construction of such a statute, said:

> "The first resort with a view to ascertaining the meaning of a statute, is to the language used; if that is plain there is an end to construction and the statute is to be taken to mean what it says. *Adams Exp. Co.* v. *Kentucky,* 238 U. S. 190."

Construction of Statute.

The Government in this case admits that the Circuit Court decided the Estill case correctly (pages 12-13 brief) and they do not question the correctness of that decision, but claim a distinction between the Estill case and this case and base it largely on the non-residence of the heirs. However, the Circuit Court did not make this distinction. The Government states that when the statute is properly read the restrictions are only removed when the inheritance was vested and the heir becomes a non-resident in the United States, at that time or any time thereafter.

In other words it is all dependent upon the act and conduct of the heir. This construction is not inferable

from the Act itself and the Government seeks to substantiate this theory by a colloquy which they say occurred between the Senators at the time the Act was passed. They further state that doubtful legislation is construed in favor of the Indian, citing *Wacester* v. *Georgia,* 6 Peters, 515, and *United States* v. *Celestine,* 215 U. S. 278.

The first case cited was decided at a time when the Government treated the Indians as a separate nation and respected their rights as such. Chief Justice Marshall was construing an Act of the State of Georgia which subjected to punishment white persons residing within the limits of the Cherokee Nation and authorized their arrest and their trial in a state court. This court held the Act repugnant to the Constitution, treaties and laws of the United States and can have no possible bearing upon the rule invoked.

The Celestine case cited was a criminal case deciding the jurisdiction of the Federal Court where a crime was committed by one Indian upon another and on an Indian Reservation. So clearly this is not applicable. Respondent feels that the rule stated in the case of First National Bank of Detroit vs. United States, cited above, is the correct rule. That is to say, that this Act contemplated the rights of others who deal with Indians and it intended to enlarge their rights to sell and encumber inherited land, regardless of their citizenship or location. Following this theory we quote from the case of *Re. Heff,* 197 U. S. 488:

> "Of late years a new policy has found expression in the legislation of Congress, * * * a policy which looks to the breaking up of tribal relations, the establishing of

> the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

It will thereby be seen that the policy of the Government is becoming more relaxed in its dealings with the Indian. There is nothing in the history of this Act, or in its apt expression, which justifies the statement made by the Government that it was the inevitable purpose of Congress to permit such of the Indians as had permanently taken up their residences in the Republic of Mexico, to sell inherited lands. Why, if this was the policy, not permit them to sell their allotted land? The Government further says that the Act, in the meantime, was to allow the leasing of such allotted lands under Government supervision.

This latter statement is in direct conflict with the proviso as such proviso provides that the Indian allottee who is a non-resident may lease his allotment without restriction for a period not exceeding five years. If the Government intended that the Indian should be a non-

resident at the time he sold his inherited land, it would have been as easy to put that provision in the purview of the Act as to provide in the proviso the condition that he must be a non-resident in order to lease his allotment.

The Act could have provided "that all restrictions as to sale and encumbrance of all lands inherited and otherwise of all adult Kickapoo Indians who are non-resident in the United States, and who have been allotted lands in Oklahoma, are hereby removed."

If this statute had read as above noted the Government's contention would be correct, but as it does not so read and as the language is clear, plain and apt there is no room for construction and we submit that the decision of the Honorable Circuit Court of Appeals should be affirmed.

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